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No. 95-401

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

IN RE THE INTEREST OF H.S.H.-K.
ELSBETH KNOTT,
Petitioner,
v.
SANDRA LYNN HOLTZMAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Judith Sperling Newton
Counsel of Record
Carol M. Gapen
STAFFORD, ROSENBAUM, RIESER & HANSEN
3 South Pinckney Street, Suite 1000
P.O. Box 1784
Madison, Wisconsin 53701-1784
608/256-0226

Attorneys for Sandra Holtzman

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Sandra Lynne Holtzman, respectfully requests that this Court deny the petition for writ of certiorari to the Wisconsin Supreme Court for review of the judgment in this case.

STATEMENT OF THE CASE

Holtzman and Knott are two women who shared a close, committed relationship for more than ten years. *In re Custody of H.S.H.-K.*, 193 Wis. 2d 649, 659-60, 533 N.W.2d 419, 421 (1995). They decided early in their relationship to rear a child together by having Knott artificially inseminated with sperm from an anonymous donor. *Id.* When Knott became pregnant in March

1988, Holtzman and Knott attended obstetrical visits and childbirth classes together. *Id.*

The child, H.S.H.-K., was born on December 15, 1988. *Id.* Holtzman was present during labor and delivery and took three weeks off from work to stay with Knott and the child. *Id.* Holtzman and Knott jointly selected a name for the baby, using first and middle names from each of their families and a surname which combined their last names. *In re Custody of H.S.H.-K.*, 193 Wis. 2d at 660, 533 N.W.2d at 422. Both women were named as H.S.H.-K.'s parents at his dedication ceremony at their church. *Id.* Holtzman's parents were recognized as the child's grandparents and Holtzman's sister was formally named his godmother. *Id.* From December 1988 until January 1, 1993, Holtzman provided the primary financial support for Knott, herself and the child, and both women shared child-care responsibilities. *Id.* Together, the three attended church, went on outings and celebrated holidays. *Id.* Holtzman devoted herself to the child and spent individual time with him. *Id.*

The two women explained to H.S.H.-K. that there are many kinds of families and that he had two parents who loved him very much. *Id.* H.S.H.-K. called Holtzman "My San," and each year on Father's Day Holtzman, Knott and H.S.H.-K. celebrated their own special holiday honoring Holtzman. *Id.*

Holtzman, Knott and H.S.H.-K. moved to Madison, Wisconsin, in June 1992, so that Holtzman could attend law school. *In re Custody of H.S.H.-K.*, 193

Wis. 2d at 661, 533 N.W.2d at 422. They bought a home in Madison, not far from Holtzman's family. *Id.* H.S.H.-K. became attached to Holtzman's parents as his grandparents and to Holtzman's sister as his aunt and godmother. *Id.*

Throughout the fall of 1992, Knott withdrew emotionally. (Petitioner's Appendix, p. 147a.) She suffered from depression, engaged in self mutilation and was placed on a suicide watch by the Mental Health Center of Dane County. (*Id.*)

On January 1, 1993, Knott told Holtzman that their relationship was over. *In re Custody of H.S.H.-K.*, 193 Wis. 2d 661, 533 N.W.2d at 422. Holtzman made every effort to maintain contact with H.S.H.-K. and spent as much time with him as Knott would allow. *Id.* On August 24, 1993, Knott informed Holtzman that she was terminating Holtzman's relationship with H.S.H.-K. *Id.*

Two days later, on August 26, 1993, Knott sought an order in Dane County Circuit Court to restrain Holtzman from having any contact with her or H.S.H.-K., claiming Holtzman had threatened or intimidated her. *Id.* At the hearing on the petition, held on September 1, 1993, the two women entered into a stipulation on the record. *Id.* Knott agreed to dismiss the petition; Holtzman agreed not to contact Knott. *Id.* Both women agreed to participate in a physical placement study to be conducted by the Dane County Family Court Counseling Service and to have a guardian ad litem appointed for the child. *Id.*

In September 1993, Holtzman filed petitions in Dane County Circuit Court seeking custody of and visitation with H.S.H.-K. *In re custody of H.S.H.-K.*, 193 Wis. 2d at 661-62, 533 N.W.2d at 422. The guardian ad litem interviewed H.S.H.-K. and reported the following facts to the circuit court: H.S.H.-K. stated that he believed Holtzman was his parent and that he would like to see, spend time with and telephone Holtzman. *Id.* H.S.H.-K. was able to recite Holtzman's new address and telephone number. *Id.* H.S.H.-K. acknowledged that Knott no longer viewed Holtzman as his parent, that she would be upset if he continued to see Holtzman, but that he wanted to see her anyway. *Id.* He stated that he did not consider anyone other than Holtzman and Knott to be his parents. *Id.* On October 28, 1993, the trial court granted Knott's motion for summary judgment and reluctantly dismissed the petitions, ruling that, under then-existing state law, Holtzman did not have standing to seek custody or visitation. *Id.* Respondent relies on petitioner's facts regarding the judicial proceedings which followed.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE WISCONSIN SUPREME COURT'S DECISION DOES NOT DEPRIVE PETITIONER OF HER RIGHT TO DUE PROCESS.

In *In re Custody of H.S.H.-K.*, 193 Wis. 2d 649, 533 N.W.2d 419 (1995), the Wisconsin Supreme Court concluded that a person who has lived with and had a parent-like relationship, with a child have standing to

seek visitation with the child when such visitation is in the child's best interests and there has been a triggering event which has interfered with the parent-child relationship. The court remanded the case to the trial court to allow respondent the opportunity to establish her right to seek visitation with the child that she and petitioner raised together for most of his life. *Id.* Petitioner claims that this decision violates her constitutional rights as a parent. She argues that her status as H.S.H.-K.'s biological mother prohibits state interference in any way with her right to make all decisions regarding H.S.H.-K. Petitioner is in error.

A parent's constitutional right to the care, custody and management of his or her child is not absolute. Parents have a liberty interest in maintaining a relationship with their children. This interest is "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (citation omitted). A restraint which is not arbitrary and which serves a legitimate purpose does not violate a parent's due process rights. For example, "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). The rights of parents to determine the education of their children must be balanced with the state's interest in the education of those children. *Id.* at 214. The issue in *Wisconsin v. Yoder* was the parents' right to determine the religious upbringing of their children when that right conflicted

with the state's requirement that children remain in school until age 16. *Id.* at 215. This Court determined that when the state's requirement of education to age 16 did not conflict with parent's religious beliefs, the requirement was reasonable. *Id.* at 233. Thus, under *Wisconsin v. Yoder*, the Wisconsin Supreme Court's decision in this case, which balances the child's right against the parent's right, is reasonable and nonviolative of petitioner's constitutional rights.

This Court "has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed." *Lehr v. Robertson*, 463 U.S. 248, 257 (1983). The Wisconsin Supreme Court's decision is consistent with these principles; it requires a balancing of the rights of both the parent and the child. Rather than ignoring or violating Knott's constitutional rights as a parent, the court balanced her "constitutionally protected liberty interest in determining how to rear a child against the best interest of the child." *In re Custody of H.S.H.-K.*, 193 Wis. 2d 668, 533 N.W.2d at 425 (footnote omitted).

Knott argues that there cannot be state involvement in a parent's decisions regarding his or her children unless the parent is unfit.[1] There is no support

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[1] Knott claims that she has been found to be a fit parent. The Wisconsin Supreme Court ruled only that on the record before it, there was no triable issue as to unfitness. *In re Custody of H.S.H.-K.*, 193 Wis. 2d at 665, 66, 533 N.W.2d at 424. Holtzman attempted to obtain mental health records to buttress her

for her argument. A parent cannot be deprived of *custody* of his or her child unless he or she is unfit. *In re Custody of H.S.H.-K.*, 193 Wis. 2d at 664-65, 533 N.W.2d at 423; *Stanley v. Illinois*, 405 U.S. 645 (1972). However, the Wisconsin Supreme Court decision does not deprive Knott of custody. It simply allows the child to have visitation, if visitation is in the child's best interests, with a person with whom he has a bonded, dependent relationship. *In re Custody of H.S.H.-K.*, 193 Wis. 2d at 533 N.W.2d at 421. That relationship was created as Knott consented to and fostered Holtzman's establishment of a parent-like relationship with H.S.H.-K. *In re Custody of H.S.H.-K.*, 193 Wis. 2d at 660-62, 695, 533 N.W.2d at 421, 422 and 436. Knott had a constitutionally protected right either to allow or not allow that relationship to develop. However, once H.S.H.-K.'s relationship with Holtzman had developed, the child's right to continue the relationship became significant and must be balanced against the rights of the parent. When Knott exercised her constitutional right to allow Holtzman to act as a parent to H.S.H.-K. and subsequently interfered with H.S.H.-K.'s relationship with Holtzman, Knott's actions in and of themselves triggered, and thus justified, the state's intervention for the sake of the child. *Id.*

The constitutional protection granted a parent is not based solely, or even primarily, on the biological link. *Lehr*, 463 U.S. at 261.

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claims of Knott's unfitness, but was denied access to them. *Id.* at n.5.

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promot[ing] a way of life' through the instruction of children ... as well as from the fact of blood relationship.

Id. (quoting *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (citation omitted)). "No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship." *Smith*, 431 U.S. at 844. It is this principle upon which the Wisconsin Supreme Court determined the factors which a person seeking visitation must demonstrate to prove that he or she had a parent-like relationship with the child. Those factors are:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

In re Custody of H.S.H.-K., Wis. 2d at 658-59, 533 N.W.2d at 421 (footnote omitted). Thus, a petitioner's standing to seek visitation depends on the child's emotional attachments to the petitioner, after the child's biological parent consented to and fostered the formation and establishment of the relationship. The application of these factors assures the child's right to associate with and maintain a relationship with a person who has been in a familial relationship with the child without violating the biological parent's constitutional rights.

II. THE WISCONSIN SUPREME COURT'S DECISION DOES NOT VIOLATE PETITIONER'S RIGHT TO EQUAL PROTECTION.

Petitioner is treated no differently under *In re Custody of H.S.H.-K.* from anyone else who consented to and fostered a relationship between his or her child and a third party. Whether or not petitioner is a member of a "unitary family" is irrelevant. The Wisconsin Supreme Court's test for standing is narrowly tailored to limit standing to petition for visitation to those persons who have an actual parent-like relationship with the child. Rather than granting standing to classifications of persons, such as those who are not members of "unitary families," the court's ruling is based very specifically on the relationship between the child and the person seeking visitation. The test was carefully crafted so that only persons with whom the child has a bonded, dependent relationship have standing to seek visitation with the child. *Id.*

Petitioner asserts, that the holding of *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), supports her argument; she is mistaken. If anything, the *Michael H.* decision supports the child's right to continue his relationship with Holtzman. In *Michael H.*, the biological father of a child brought an action to establish paternity and visitation with the child who was living with her mother and her mother's husband. Although the biological father had lived with the mother and the child for a short period of time, the Court found that he did not have the right to a determination that he was the child's father.[2] *Id.* at 127. Instead, the Court considered the child, though unrelated to her stepfather, to be his legal child. *Id.*

In *Michael H.*, the Court explained the concept of the "unitary family," which "is typified, of course, by the marital family, but also includes the household of unmarried parents and their children." *Id.* at 123, n.3. Biological relationships are not the exclusive determination of the existence of a family. *Smith*, 431 U.S. at 843. H.S.H.-K. lived in a household of unmarried parents. His unitary family consisted of himself, Knott, and Holtzman. If there is an analogy to *Michael H.*, it is that Holtzman's relationship with H.S.H.-K. was similar not to that of the biological father, but to that of the mother's husband whose relationship

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[2] The concurring opinion of Justice Stevens in *Michael H.*, noted that under the California statute, the biological father could seek visitation with the child as "a person having an interest in the welfare of the child. *Michael H.*, 491 U.S. at 133." The constitutionality of the California statute was not questioned.

with the child was protected. Likewise, the Wisconsin Supreme Court's decision protects H.S.H.-K.'s relationship with Holtzman.

Petitioner's argument that the adoption of the Wisconsin Supreme Court's test will open the floodgates to unrestricted rights of visitation is absurd. The test is extremely limiting; it applies only to relationships which have been fostered by the parent and in which the party seeking visitation lived in the same household with the child and provided daily care and support for the child. It does not apply to casual or commercial relationships. It applies only when the child has formed a bonded, dependent relationship with the person seeking visitation. In such a situation, allowing visitation can prevent the harm to a child caused by the loss of a person on whom the child relies physically and emotionally. From the child's perspective, the biological or legal status of his or her family-in-fact members is irrelevant; what matters to the child is the continuation of important relationships. The Wisconsin Supreme Court's test is neither underinclusive nor overinclusive; it is carefully crafted to benefit children while protecting the biological parents' constitutional rights.

III. THE ISSUE OF CHILD VISITATION MUST BE RESOLVED BY THE STATES.

Domestic relations disputes have traditionally been the province of the states. *Thompson v. Thompson*, 484 U.S. 174, 186 (1988). States have a long tradition of determining the visitation rights of both parents and nonparents. *See In re Custody of H.S.H.-K.*, 193 Wis.2d

at 692-93 n.37, 533 N.W.2d at 435 n.37. Every one of the fifty states allows grandparents to petition for visitation under certain circumstances.[3] Some states,

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[3] ALA. CODE §§ 30-3-3, 30-3-4 (1994); ALASKA STAT. § 25.24.150 (1994); ARIZ. REV. STAT. ANN. § 25-337.01 (1995); ARK. CODE ANN. § 9-13-103 (Michie 1994); CAL. FAMILY CODE §§ 3101-3104 (West 1995); COLO. REV. STAT. ANN. §§ 19-1-117, 19-1-117.5 (West 1995); CONN. GEN. STAT. ANN. § 46b-59 (West 1995); DEL. CODE ANN. tit. 10, § 1031 (1994); FLA. STAT. ANN. §§ 39.4105, 752.01 (West 1995); GA. CODE ANN. §§ 19-7-3, 19-9-3 (Michie 1995); HAW. REV. STAT. § 571-46.3 (1994); IDAHO CODE § 32-719 (1995); ILL. ANN. STAT. ch. 750, para. 5/607; ch. 755, para. 5/11-7.1 (Smith-Hurd 1995); IND. CODE ANN. §§ 31-1-11.7-2, 31-1-11.7-3 (West 1995); IOWA CODE ANN. § 598.35 (West 1995); KAN. STAT. ANN. § 38-129 (1994); KY. REV. STAT. ANN. § 405.021 (Baldwin 1995); LA. REV. STAT. ANN. § 9:344 (West 1995); ME. REV. STAT. ANN. tit. 19, §§ 1001-1004 (West 1994); MD. CODE ANN., FAM. LAW § 9-102 (1995); MASS. GEN. LAWS ANN. ch.119, § 39D (West 1995); MICH. COMP. LAWS ANN. § 722.27b (West 1995); MINN. STAT. § 257.022 (1994); MISS. CODE ANN. §§ 93-16-1, 93-16-3 (1993); MO. ANN. STAT. § 452.402 (Vernon 1995); MONT. CODE ANN. § 40-9-102 (1994); NEB. REV. STAT. §§ 43-1801, 43-1802 (1994); NEV. REV. STAT. §§ 125A.330, 125A.340 (1993); N.H. REV. STAT. ANN. § 458:17-d (1994); N.J. STAT. ANN. § 9:2-7.1 (West 1995); N.M. STAT. ANN. §§ 40-9-1.1, 40-9-2 (Michie 1995); N.Y. DOM. REL. LAW § 72 (McKinney 1995); N.C. GEN. STAT. §§ 48-23, 50-13.2, 50-13.2A (1994); N.D. CENT. CODE § 14-09-05.1 (1995); OHIO REV. CODE ANN. §§ 3109.051, 3109.11, 3109.12 (Baldwin 1995); OKLA. STAT. ANN. tit. 10, §§ 5, 60.16 (West 1995); OR. REV. STAT. §§ 109.121, 109.123 (1994); 23 PA. CONS. STAT. ANN. §§ 5311-5314 (1995); R.I. GEN. LAWS §§ 15-5-24.1, 15-5-24.2, 15-5-24.3 (1994); S.C. CODE ANN. § 20-7-420 (1993); S.D. CODIFIED LAWS ANN. § 25-4-52, 25-4-53, 25-4-54 (1995); TENN. CODE ANN. § 36-6-301 (1994); TEX. FAM. CODE ANN. § 14.03 (1995); UTAH CODE ANN. §§ 30-5-1, 30-5-2 (1995); VT. STAT. ANN. tit. 15, §§ 1011, 1012 (1994); VA. CODE

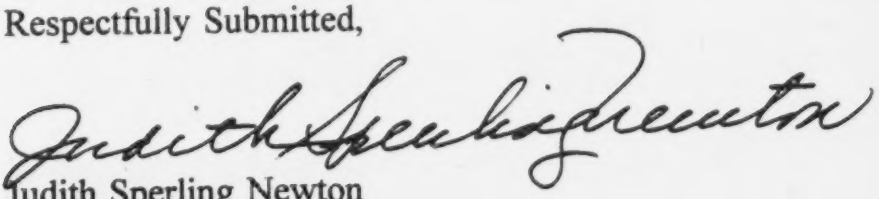
such as Delaware, allow grandparents to petition for visitation regardless of the marital status of the child's parents. DEL. CODE. ANN. tit. 10 § 1031(7) (1994). Arkansas allows siblings to visit over their parents' objections. ARK. CODE ANN. § 9-13-102. In Minnesota, a person who has resided for two years in the same household as a child may petition for visitation with the child. MINN. STAT. § 257.022. The state of Washington allows the court to order visitation rights for a person other than a parent when visitation may serve the best interests of the child. WASH. REV. CODE ANN. § 26.09.240 (West 1995). Each of the states has carefully balanced the rights of the parents, the children and the persons seeking visitation. Likewise, the Wisconsin Supreme Court reached a balance giving great weight to Knott's constitutional rights while protecting the best interests of this child. If the Wisconsin Supreme Court decision is upset, it will destroy the right of all states to protect the relationships children have with the important people in their lives.

ANN. §§ 16.1-278.15, 63.1-204.1 (Michie 1995); WASH. REV. CODE ANN. § 26.09.240 (West 1995); W. VA. CODE §§ 48-2B-1 - 48-2B-6 (1995); WYO. STAT. § 20-7-101 (1995).

CONCLUSION

The decision of the Wisconsin Supreme Court was narrowly drawn to protect the constitutional rights of biological parents and the best interests of children. For all the reasons discussed herein, respondent Sandra Lynne Holtzman respectfully requests that the petition for a writ of certiorari be denied.

Respectfully Submitted,



Judith Sperling Newton
Counsel of Record
Carol M. Gapen
STAFFORD, ROSENBAUM, RIESER & HANSEN
3 South Pinckney Street, Suite 1000
P.O. Box 1784
Madison, Wisconsin 53701-1784
608/256-0226

Attorneys for Sandra Holtzman

October 6, 1995.